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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARY J. EPPS, PETITIONER

v.

DAVID BAER

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this action for damages against David Baer, an employee of the Internal Revenue Service who was responsible for the seizure and retention of petitioner's property for unpaid taxes. She seeks review of the decision below awarding judgment in favor of respondent Baer notwithstanding the verdict on the ground that his action in refusing to release the government's levy and declining to return petitioner's property prior to the payment of the taxes due was taken on the advice of counsel and within a reasonable time after petitioner requested the return of her property.

The pertinent facts may be summarized as follows: In 1973, petitioner was the owner of J.J.'s Bar and Grill in Baltimore (Pet. App. A-2). On May 18, 1973, officers of the Internal Revenue Service, acting pursuant to a jeopardy assessment, seized the personal property and equipment located at petitioner's place of business and padlocked the

premises (Pet. App. A-2; J.A. 56-59).¹ Petitioner conceded that this jeopardy assessment was valid and that she had no constitutional or statutory right to the release of the levy. In 1973, petitioner applied on two occasions for discretionary release of the seized property prior to payment of the taxes due so that she could reopen the business and pay off the tax liability in installments (Pet. App. A-10 to A-12). After the second of these requests, respondent requested one of his subordinates to seek an opinion from the Regional Counsel of the Internal Revenue Service whether petitioner's application should be granted and the seizure lifted. The IRS Regional Counsel concluded that the application did not offer adequate protection to the government because it did not provide for the posting of a bond to secure payment of the taxes (Pet. App. A-13).²

No bond was posted and the property remained under seizure until 1978, when it was released, after having been extensively vandalized (Pet. App. A-2 to A-3). Petitioner thereafter brought this damages action in the United States District Court for the District of Maryland, against respondent and several other Internal Revenue Service officials who participated in the tax levy and in the consideration of petitioner's requests for the release of that levy (Pet. App. A-1). Petitioner alleged that respondent's refusal to release

¹"J.A." refers to the joint appendix filed in the court of appeals.

²Petitioner contends (Pet. 4) that no bond was required for respondent to exercise his discretionary authority under Section 6343(a) of the Internal Revenue Code of 1954 (26 U.S.C.) to release the levy and return her property. However, the exercise of authority under Section 6343(a) is contingent upon a finding that release of the property will facilitate collection of the liability. Here, in a case in which collection of the liability had been found to be in jeopardy, the Regional Counsel might well have concluded that petitioner's property should not be returned without some assurance, in the form of a bond, that the taxes for which it had been seized would ultimately be paid.

the property was arbitrary and capricious and violated her right to due process (Pet. App. B-2 to B-3). The case against respondent and two other Internal Revenue officials went to trial before a jury. One of the other defendants was granted a directed verdict, and the other was awarded a jury verdict in his favor (Pet. App. A-1 to A-2). The jury, however, found against respondent, and awarded \$100,000 in compensatory damages and \$100,000 in punitive damages to petitioner (Pet. App. A-2). The district court granted respondent's motion for judgment notwithstanding the verdict. The court found that while there was enough evidence in the record to support the conclusion of the jury that respondent had not acted in good faith in refusing petitioner's initial request for the return of the seized property, there was no support for its conclusion that respondent's rejection of petitioner's second request for the return of the property was not made in good faith (Pet. App. A-13 to A-17). In so ruling, the court found that respondent proceeded properly. As the court pointed out, before acting on this second request, respondent had sought the advice of Regional Counsel, and had relied on that advice in refusing to return the property to the petitioner unless she posted a bond (Pet. App. A-14). Since petitioner's property was not damaged until after respondent's second refusal to return the property, it concluded that respondent's earlier conduct could not have been the cause of her loss.

The court of appeals affirmed. The court held that under the objective standards for qualified immunity established by this Court in *Harlow v. Fitzgerald*, No. 80-945 (June 24, 1982), respondent was immune from liability for damages because none of his actions in connection with the levy on petitioner's business violated any of her clearly established statutory or constitutional rights (Pet. App. B-4 to B-5).

1. Petitioner contends (Pet. 8-10) that the decision below conflicts with *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978). In *Dellums v. Powell*, *supra*, 566 F.2d at 185-186, the court of appeals upheld the refusal of a district court to direct a verdict in favor of the Chief of the United States Capitol Police based on the fact that he had consulted an attorney before arresting certain demonstrators on the Capitol grounds. The court found that there was a jury question as to whether the defendant had consulted counsel in good faith, and as to whether he had informed his counsel that the Speaker of the House of Representatives had suspended the rule forbidding such demonstrations before any arrests were made. *Id.* at 177, 184-186. Here, on the other hand, the district court found that there was no evidence to suggest that respondent did not act in good faith in requesting and relying upon the opinion of the IRS Regional Counsel as to the conditions to be imposed before the government would consent to return petitioner's property, which, as the petitioner conceded, had been lawfully seized for the payment of her taxes (Pet. App. A-3, A-14 to A-15). *Dellums* is therefore distinguishable.

2. Petitioner further contends (Pet. 10-13) that the decision below conflicts with this Court's decision in *Harlow v. Fitzgerald*, *supra*. In *Harlow*, this Court pointed out that inquiries into the subjective good faith of government officials in civil damage actions had resulted in substantial disruption of the government because such inquiries tended to subject the officials involved to wide ranging discovery, including intrusive questioning concerning their thought processes and communications with other persons involved in formulating government policy. To prevent this type of abuse, the Court held that "officials performing discretionary functions generally are shielded from liability for civil

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (slip op. 17).

The court of appeals correctly applied this standard to the present case. The evidence introduced at trial showed that respondent, through a subordinate, had consulted with a special narcotics strike force during the course of his deliberation on petitioner's request for the release of her property. He did so because petitioner was the sister of John Edward ("Liddy") Jones, a reputed drug dealer. The strike force recommended against release. Respondent thereafter requested the advice of the IRS Regional Counsel and on that advice informed petitioner that her property would be released on the posting of a bond to insure collection (Pet. App. B-3).

Contrary to petitioner's argument (Pet. 11), respondent's consultation with the Organized Crime Strike Force of the Department of Justice was entirely proper. As the court of appeals pointed out, respondent's efforts to seek all information he deemed pertinent to the collection of petitioner's delinquent taxes were discretionary acts that did not violate any clearly established statutory or constitutional rights (Pet. App. B-5).³ Thus, under the objective standard of *Harlow v. Fitzgerald*, *supra*, respondent's actions prior to consulting with the IRS legal counsel were shielded by the defense of qualified immunity. The courts below therefore properly awarded judgment in favor of respondent notwithstanding the verdict.

³Cf. Section 6103(i) (1) and (2) of the 1954 Code (effective Jan. 1, 1977) for subsequently enacted legislative restrictions on the disclosure of "return information" and "taxpayer return information" in connection with the investigation of federal crimes not relating to tax administration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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